

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

CS Docket No. 99-363

To: The Commission

**JOINT COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS**

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Summary

The language of the Satellite Home Viewer Improvement Act (“SHVIA”) amending Section 325 of the Communications Act does not contain a broad warrant, as the *Notice* seems to presume, granting the Commission authority in connection with satellite retransmission consent negotiations (i) to define what constitutes “good faith” negotiations, (ii) to equate “good faith” with the complex body of law developed by the National Labor Relations Board in labor negotiations or with that developed by the Commission for telephone interconnection negotiations pursuant to Section 251 of the Act, or (iii) to prescribe a menu of *per se* violations. Neither the statute, itself, nor the Conference Report support such an expansive read of Congressional intent or of the regulatory authority of the Commission. Moreover, neither the labor context nor the telephone interconnection context cited by the Commission in the *Notice* is factually analogous. The new statutory requirement for satellite carrier negotiations must be interpreted against the background of broadcast retransmission consent negotiations with cable, SMATV, and MMDS systems that did not involve intrusive regulation by the Commission and against the background of a common law tradition that has zealously guarded the rights of parties in a free and competitive market to negotiate at arm’s length.

In short, the amendment to Section 325 grants the Commission very limited authority to promulgate *implementing regulations*. There is no basis in the statutory language for the Commission to infer that Congress intended to authorize it to re-write the statute or expand in any substantive manner the “good faith” or “exclusive” language Congress adopted. To implement the statute, the Commission is neither required nor authorized to do any more than follow its plain directive.

The Commission must recognize that broadcasters have a marketplace incentive to reach program distribution agreements with satellite carriers. Local broadcasters need and desire to have as many viewers watching their stations' programming as possible. The economic reality of over-the-air broadcasting is that viewership translates into advertising revenue. Each retransmission consent negotiation is tempered by that basic economic reality. That fact has been an overarching consideration in every retransmission consent negotiation between broadcast stations and other MVPDs, and there is no reason to think that it will not be the case with satellite carriers.

The imposition of a requirement upon broadcasters to negotiate in "good faith" is a duty in derogation of the recognized common law right of freedom of contract. Thus, the statute must be narrowly construed. A "fail[ure] to negotiate in good faith" should simply be a failure to meet at reasonable times and places and confer on the terms of an agreement. That, at bottom, is all the "good faith" requirement requires and is all that Congress, plainly, intended for the Commission to require. This requirement, if incorporated into the Commission's regulations, would be a simple, easy to administer, bright line requirement that comports with the obvious intent of Congress. Moreover, it would spare the Commission from the burdensome and costly task of intrusive administrative oversight of potentially thousands of MVPD/broadcast station retransmission consent negotiations. It must be kept in mind that the statute applies not only to the existing four satellite carriers, it applies as well to dozens of cable systems and SMATV systems and other MVPDs that operate within the markets of the nation's 1200 local commercial television stations.

"Good faith" negotiation necessarily requires a mutual obligation. It is difficult to fathom any public interest benefit in placing all the burden upon the broadcast station and insulating

MVPDs from a reciprocal requirement. A broadcast station cannot negotiate with an empty chair.

Because the Commission cannot write the retransmission consent agreement for the parties, cannot make the bargain for the parties, and cannot compel one party to assent to any particular terms, it would be a gross waste of administrative resources for the Commission to promulgate substantive negotiating regulations. Indeed, the more regulations the Commission attempts to impose on the bargaining process, the higher the regulatory and transactional costs—for the Commission, the public, and the affected parties. The end result will be that unnecessary Commission intervention in the free market process will discourage parties from concluding mutually satisfactory deals in the first place. Intrusive, unnecessary rules will simply increase the potential for costly, time-consuming litigation before the Commission.

The meaning of “competitive marketplace considerations” can only be determined on a case-by-case basis. By attempting to define prospectively what may constitute “competitive marketplace considerations,” the Commission would, in the end, become ensnarled in defining the terms and conditions of each retransmission consent bargain—something the Commission is without the statutory authority to do. It is difficult to imagine a result more at odds with a “competitive” market than a market manipulated by regulatory fiat.

In adopting the exclusivity prohibition, Congress acted with knowledge of the Commission’s existing rule in 47 C.F.R. § 76.64(m) prohibiting exclusive retransmission consent agreements since that rule was promulgated as a consequence of the 1992 Cable Act’s directive in Section 325(b)(3)(A). The new statutory language, therefore, merely codifies the existing regulatory regime until January 1, 2006. However, recognizing this prohibition as an intrusion into the marketplace, Congress provided for its sunset. The proscription against “exclusive”

retransmission agreements means precisely what it says: A retransmission arrangement that is entered into by a broadcast station with one MVPD serving the area which precludes the station from entering into a retransmission consent arrangement with any other MVPD serving the same area.

With respect to enforcement, there is no reason to depart from the special relief and complaint procedures set forth in Section 76.7 of the Commission's rules. Such procedures are clearly adaptable for addressing issues that may arise with respect to Section 325(b)(3)(C)(ii). Expedited procedures are neither necessary nor statutorily authorized.

It is also significant that Section 76.7 of the Commission's rules provides no burden shifting mechanism—nor is one warranted here. The burden of proof in any “good faith” or “exclusivity” complaint proceeding must remain on the complainant. The Commission should always keep in the fore of its consciousness the principle that the restrictions in Section 325(b)(3)(C)(ii) are in derogation of the common law right of freedom of contract and therefore must be narrowly construed. Because a complainant will be seeking government intervention in the competitive, free marketplace, the burden of making a *prima facie* case and the ultimate burden of proof should always remain on the complaining party.

The Network Affiliates respectfully urge the Commission not to intrude into these negotiations and not to adopt an unnecessary, burdensome regulatory structure.

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The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the “Network Affiliates”), by their attorneys, hereby submit these comments in response to the Commission’s *Notice of Proposed Rule Making* (“Notice”), FCC 99-406, released December 22, 1999, in the above-captioned proceeding. The Network Affiliates represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks.

The *Notice* requests comment in two stages on retransmission consent issues arising from implementation of the Satellite Home Viewer Improvement Act¹ (“SHVIA”). In the first stage, comment is requested on the “good faith” negotiation and “exclusive” carriage provisions. In the second stage, comment is requested on the process by which television stations may elect

¹ Pub. L. No. 106-113, § 1000(a)(9), 113 Stat. 1501 (1999) (enacting S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, of which Title I is the Satellite Home Viewer Improvement Act of 1999).

“retransmission consent” or “must carry” status and on other administrative matters. These comments address the first stage of the proceeding.

I. Congress Did Not Give The Commission Expansive Authority To Fashion “Good Faith” Negotiation Requirements In Derogation Of Common Law

In SHVIA, Congress, *inter alia*, amended Section 325 of the Communications Act, to require the Commission to “revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent.”² The Act states that the Commission shall:

until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.³

The statute does not contain a broad warrant, as the *Notice* seems to presume, granting the Commission authority to promulgate prospectively an intrusive regulatory scheme to define “good faith,”⁴ or to adopt a test for “good faith” comparable to that developed over the years by the courts and the National Labor Relations Board (“NLRB”) for labor negotiations or the menu of regulatory requirements adopted by the Commission pursuant to the local competition provisions of the Telecommunications Act of 1996 (“1996 Act”) that govern negotiations for

² 47 U.S.C. § 325(b)(3)(C).

³ *Id.* at § 325(b)(3)(C)(ii).

⁴ *See Notice* at ¶ 15.

interconnection agreements between telecommunications carriers,⁵ or to adopt a prospective list of *per se* violations.⁶ As shown below, neither the statutory language itself nor the Conference Report supports such an expansive role for the Commission. Moreover, the “good faith” provision has to be construed in light of the history of retransmission consent negotiations between television broadcast stations and other multichannel video program distributors (“MVPDs”) and against the background of a common law tradition that has zealously guarded the rights of parties in a free market to negotiate without intrusive government oversight.

**A. The Statutory Language Does Not Grant The
Commission Authority To Promulgate An
Intrusive Regulatory Scheme**

The operative language of the amendment is narrow. Congress has told the Commission to “revise” its existing regulations governing retransmission consent to take into account the possibility of local-into-local satellite retransmission of broadcasters’ signals, and Congress has specified *only* that the “regulations shall” prohibit broadcast stations from “engaging in exclusive contracts for carriage or failing to negotiate in good faith” while providing that certain circumstances shall not be deemed to be a failure to negotiate in good faith.⁷ In other words, Congress has only instructed the Commission to “prohibit” a television station that “provides retransmission consent” to at least one MVPD from “failing to negotiate in good faith” and from “engaging in exclusive” retransmission consent contracts with other MVPDs. The “revise”

⁵ See *id.* at ¶¶ 16-18.

⁶ See *id.* at ¶ 18.

⁷ 47 U.S.C. § 325(b)(3)(C) & § 325(b)(3)(C)(ii).

language in the statute is significant because Congress acted with knowledge of the current language in Section 325(b)(3)(A) & (B) and the regulations in Section 76.64⁸ adopted by the Commission to implement the 1992 Cable Act. Section 325(b)(3)(A) required the Commission to adopt retransmission consent rules to implement the reforms of the 1992 Cable Act.⁹ Arguably, subparagraph (A) granted the Commission greater rulemaking latitude than the new subparagraph (C) does as subparagraph (A) required the Commission to “consider” the impact of retransmission consent on cable rates. No such discretion is granted to the Commission by the language in new subparagraph (C).

Clearly, as the specific language of subparagraph (C) and SHVIA as a whole makes plain, Congress intended that the Commission revise its existing regulations to account for retransmission consent agreements between broadcasters and satellite carriers that now qualify

⁸ See 47 C.F.R. § 76.64.

⁹ Section 325(b)(3)(A) provides:

Within 45 days after October 5, 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 534 of this title, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission’s obligation under section 543(b)(1) of this title to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after October 5, 1992.

47 U.S.C. § 325(b)(3)(A).

for a compulsory copyright license to provide local television stations to satellite subscribers. The statutory language cannot be read to grant the Commission new, wholesale authority to define “good faith”—a task for which the Commission possesses no more expertise than Congress—and to create regulatory tests to cabin in the rights of parties engaged in the competitive give-and-take of the marketplace.

The narrow scope of the Commission’s authority is further supported by the language in subparagraph (C) that permits the Commission to promulgate “such other regulations as are necessary to administer the limitations contained in paragraph (2).”¹⁰ Paragraph (2) sets forth the circumstances in which subsection (b) governing retransmission consent does not apply and thus is not of direct concern here. But the language of subparagraph (C) granting the Commission the authority to issue “such other regulations” shows both that Congress knows how to grant rulemaking discretion to the Commission when it so desires and that, by the absence of such language later in the same subparagraph, that Congress did not intend to grant such discretion with respect to erecting some unanticipated, prospective regulatory framework for “good faith” negotiation.¹¹

In short, the amendment to Section 325 only grants the Commission limited authority to promulgate *implementing* regulations. There is no basis in the statutory language to infer that Congress intended to authorize the Commission to re-write or expand in any substantive manner

¹⁰ *Id.* at § 325(b)(3)(C).

¹¹ *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

the “good faith” language contained in the statute. To *implement* the statute, the Commission is neither required nor authorized to do any more than follow its plain language.¹²

Finally, it should also be noted that the “good faith” negotiation and “exclusive” carriage provisions are triggered by the express language of the statute only after a station “provides” retransmission consent to at least one MVPD.

B. The Conference Report Cannot Be Interpreted As Granting Greater Authority Than The Narrow Language Of The Statute

As the *Notice* acknowledges, the Conference Report adds little additional insight into Congress’s intent with respect to this provision.¹³ The Conference Report states in full:

Section 1009 also amends section 325(b) of the Communications Act to require the Commission to issue regulations concerning the exercise by television broadcast stations of the right to grant retransmission consent. The regulations would, until January 1, 2006, prohibit a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor or refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The FCC may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.¹⁴

¹² Cf. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, FCC 93-178, 72 Rad. Reg. 2d (P & F) 649 (1993), at ¶ 10 (stating that the Commission “will follow the plain language of the statute by applying the general prohibition in Section 628(b) against ‘unfair methods of competition’ and ‘unfair or deceptive acts or practices’”).

¹³ See *Notice* at ¶ 14.

¹⁴ Joint Explanatory Statement of the Committee of Conference (“Conference Report”), at 13.

Nowhere in the legislative history can it be inferred that Congress intended the Commission to do anything other than what the statutory language itself requires or that Congress intended to grant the Commission expansive authority to promulgate substantive rules governing the retransmission consent negotiation process. Because “competitive marketplace considerations” are highly fact-dependent and can only be determined on a case-by-case basis, the statute plainly contemplates that the FCC may determine—in its *adjudicatory role*—when different terms offered by a broadcaster to a MVPD constitute a failure to negotiate in good faith.

As Senator Kohl observed in his remarks on the Senate floor, which are quoted in the *Notice*,¹⁵ the House and Senate had diametrically opposite points of view with regard to retransmission consent negotiations. The statute, as enacted, reflects a congressional compromise that “comes out somewhere in the middle.”¹⁶ As such, any other legislative history or floor statements on this point, especially relating to earlier versions of the conflicting provisions in the House and Senate bills, are of little relevance.¹⁷ Apparently Congress was of two minds on the “good faith” requirement, and the Senate and House conferees provided little guidance on construction of the compromise language. The statutory language was intentionally

¹⁵ See *Notice* at ¶ 14 n.28 (quoting 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (statement of Sen. Kohl)).

¹⁶ *Id.*

¹⁷ For example, an earlier House bill would have imposed non-discrimination rules. See Satellite Competition and Consumer Protection Act, H.R. 851, 106th Cong. § 101 (1999). However, Congress clearly decided *not* to follow the House’s approach. Thus, the Commission should neither read into the law as enacted stricter requirements than Congress ultimately settled upon nor indirectly implement the House’s rejected approach by actively formulating an improperly broad interpretation of “good faith.”

left minimalistic. There is no reason to believe from the legislative history or from the policy objectives to be served by the new law that Congress intended the Commission to adopt a prospective, highly intrusive regulatory scheme that would govern retransmission consent negotiations. Had Congress intended that result, it would have said so.

**C. There Is No Warrant To Import Labor And
Interconnection Agreement Requirements Into
The Retransmission Consent Context**

Even if Congress had granted the Commission authority to adopt an intrusive regulatory scheme, there is no basis to paint “good faith” in the context of retransmission consent negotiations with the broad brush of labor law or interconnection agreement requirements as the *Notice* seems to suggest.¹⁸ Labor law and the local telephone competition provisions of Sections 251 and 252 of the 1996 Act are not analogous to retransmission consent agreements for television stations. Different factual contexts and different policy objectives underlie these different acts of Congress and, accordingly, mandate a different regulatory scheme. Therefore, the policy rationales for *per se* violations in those other contexts simply do not apply here. For example, there is a natural antagonism between employers and unions and between monopolistic incumbent local exchange carriers (“ILECs”) and competing local exchange companies (“CLECs”) that simply does not exist between broadcasters and MVPDs.

Surely the Commission must recognize that local stations desire to have—indeed, must have—program distribution by local MVPDs. Local television stations depend on viewership for advertising sales. More viewers yield more advertising revenue. More advertising revenue

¹⁸ See *Notice* at ¶¶ 16-18.

yields more net profits. It is as simple as that. This fundamental market force works to restrain a local television station from engaging in abusive negotiating practices. Program distribution and the degree to which MVPDs bring additional viewers to local stations serve to drive the parties toward—not away from—retransmission consent agreement. This fact is confirmed by the history of the several thousand retransmission consent negotiations that have been successfully concluded between local television stations and cable systems, SMATV systems, and MMDS services since the 1992 Cable Act was adopted. The record speaks for itself and stands as the best evidence that intrusive FCC regulatory oversight has been and continues to be unnecessary. Retransmission consent negotiations between local stations and cable systems, SMATV systems, and MMDS services, while sometimes contentious and protracted, have taken place over the last six years without intrusive regulatory involvement by the Commission. There is no reason to think that the addition of satellite carriers to the mix of MVPDs will change anything in this regard.

Satellite carriers may argue that because the satellite industry now has fewer subscribers than cable systems, satellite carriers will not possess the “leverage” cable has with local stations, and thus, the Commission must somehow give it a regulatory advantage in the negotiations. Were that true, then SMATV systems and MMDS services would have been similarly disadvantaged over the last six years and would not have been able to obtain retransmission consent agreements with local television stations without FCC assistance. The history here, however, belies that notion. The government has not had, and does not now need, a seat at the retransmission consent negotiating table.

Those advocating a new, comprehensive regulatory scheme bear the burden of producing evidence to show that the public interest has in the past been adversely affected in the absence of it. The evidence is not there; the showing cannot be made; and the burden cannot be met.

Unlike local broadcast stations, employers in the labor context and ILECs in the interconnection context are in a position to abuse their market power. Thus, it became necessary for the NLRB, with the approval of the Supreme Court, through many years of developed case law,¹⁹ and the Commission, in implementing the local competition provisions of the 1996 Act (and guided by the labor law analogy),²⁰ to develop *per se* violations delineating the failure to negotiate in good faith. However, there is no “official list” of “enumerated *per se* violations of the duty to negotiate in good faith” in labor negotiations, as the *Notice* seems to imply.²¹ Rather, labor case law over the past half century has recognized certain kinds of conduct to be incompatible with the duty to bargain in good faith, just as antitrust case law has come to recognize that certain anti-competitive conduct will constitute a *per se* violation of the antitrust laws. But these *per se* case law violations have evolved over a period of many years out of actual experience in adjudicated controversies. It would be presumptuous in the extreme for the Commission to adopt a prospective satellite carrier/broadcast station retransmission consent

¹⁹ See, e.g., *NLRB v. General Electric Co.*, 418 F.2d 736, 767 (2d Cir. 1969) (Friendly, J., concurring and dissenting) (discussing the development of *per se* violations of the duty to negotiate in good faith), *cert. denied*, 397 U.S. 965 (1970).

²⁰ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, FCC 96-325, 4 Comm. Reg. (P & F) 1 (1996), at ¶¶ 154-55 & nn. 288, 292.

²¹ *Notice* at ¶ 16 (emphasis added).

negotiating regulatory scheme before the negotiations take place. The foresight of a clairvoyant would be required to guess at this time what factors may or may not constitute “bad faith” in a specific satellite carrier/broadcast station negotiation.

Furthermore, it is noteworthy that the collective bargaining agreement is a special kind of contract arising from the compulsory nature of the bargaining relationship imposed by labor law. Employers are required by law to bargain with the union that represents a majority of the employees, *to the exclusion of all other unions*.²² This is in marked contrast to the competitive marketplace of MVPDs and broadcast stations.

The Commission, in implementing the local competition provisions of the 1996 Act, was confronted with altogether different economic and marketplace realities in adopting a *per se* violation regulatory scheme for telephone interconnection negotiations. Unlike broadcast stations, ILECs have long enjoyed the privilege of a government-sanctioned monopoly. It is not in the self-interest of monopolistic ILECs to lease their facilities to new CLECs. The history of the telephone industry has been a history of abusive exercise of monopoly power. Government oversight was—and continues to be—necessary to ensure the transformation from a monopolistic telephone market to a competitive telephone market. The local telephone marketplace is, of course, altogether different than the local television program marketplace.

²² See Robert S. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 530-33 (1969).

D. The Common Law Contract Rights Of Broadcasters Must Be Respected

A particularly disturbing aspect of an intrusive regulatory approach is its failure to recognize—and hence its failure to protect—a broadcaster’s common law right to negotiate and common law right to contract. The statutory imposition of a duty upon a broadcaster to negotiate a retransmission consent agreement in “good faith” is in derogation of the long-standing common law right to contract, and therefore the duty, though statutorily imposed, must be narrowly construed. “Any such rule of law, being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law, farther than its words import.”²³

Outside the labor law context, judicially mandated good faith in precontractual negotiation is rarely imposed.²⁴ Indeed, the general rule in Anglo-American jurisprudence is that there is no implied obligation to negotiate an arm’s-length contract in good faith.²⁵ Such is the established notion of freedom of contract that, while both the Uniform Commercial Code

²³ *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) (internal quotation marks and citation omitted). See also E. Allan Farnsworth, *CONTRACTS* § 3.26 (2d ed. 1990) (recognizing that any requirement to “negotiate in good faith” is a departure from core common law principles protecting the freedom of contract).

²⁴ Precontractual liability for a failure to negotiate in good faith has only been sporadically imposed in rare circumstances of unjust enrichment, see *Hill v. Waxberg*, 237 F.2d 936 (9th Cir. 1956), fraudulent misrepresentation, see *Markov v. ABC Transfer & Storage Co.*, 457 P.2d 535 (Wash. 1969), and where a specific promise is made during negotiations followed by detrimental reliance, see *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis. 1965).

²⁵ See, e.g., *Racine & Larmie, Ltd. v. California Dep’t of Parks and Recreation*, 14 Cal. Rptr. 2d 335, 339 (Ct. App. 1992); *Magna Bank v. Jameson*, 604 N.E.2d 541, 544 (Ill. Ct. App. 1992); *Frutico, S.A. de C.V. v. Bankers Trust Co.*, 833 F. Supp. 288, 300 (S.D.N.Y. 1993).

(“U.C.C.”) and the Restatement (Second) of Contracts impose a duty of good faith on parties to a contract in their performance or enforcement thereof, both notably exclude any good faith duty in the *negotiation* of a contract.²⁶ It should be noted that the *Notice*’s suggestion that the Commission adopt the U.C.C.’s definition of “good faith”²⁷ involves a definition that applies only after the contract has been formed—this is why it is expressly applicable “*in the conduct or transaction concerned.*”²⁸ Even were the Commission authorized to adopt a definition of “good faith,” plainly the U.C.C.’s definition is inappropriate.

When Congress imposed the duty to negotiate in good faith in Section 325, it acted against this well-established backdrop of freedom of contract.²⁹ Congress’s minimalistic approach to the good faith negotiation requirement—by its purposeful failure both to define “good faith” and to grant the Commission authority to do so—evinces its intention to intrude lightly into the bargaining process and the give-and-take of the marketplace.³⁰ That such was

²⁶ See U.C.C. § 1-203; RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (stating that “[t]his section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract”).

²⁷ See *Notice* at ¶ 15.

²⁸ U.C.C. § 1-201(19) (emphasis added).

²⁹ See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles.”)

³⁰ See *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”)

Congress's intent is made clear by the statement of the Conference Committee in which it recognized that it

needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate.³¹

That such was Congress's intent is further demonstrated by the fact that Congress expressly provided statutory language to indicate behavior that is not bad faith, viz. that

it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.³²

The fact that Congress made it a point to provide that broadcasters could offer different terms and conditions, including price terms, to different MVPDs manifests an intention to allow the competitive marketplace to operate freely.

As shown above, the statutory language of Section 325 clearly does not give the Commission free rein to determine what constitutes "good faith" other than on an adjudicatory case-by-case basis, and it certainly does not grant the Commission authority to intrude prospectively into the workings of the marketplace without any evidence of a need to do so. The Conference Committee's own caution in "minimiz[ing] the effects of the government's intrusion on the broader market," together with the fact that the duty to negotiate in good faith is in derogation of common law rights, confirm that Congress intended the "good faith" negotiation

³¹ Conference Report at 2.

³² 47 U.S.C. § 325(b)(3)(C)(ii).

requirement to be narrowly construed and that it did not intend or expect the Commission to take on an activist stance on a matter that Congress purposely left abstract and to be resolved on an adjudicated case-by-case basis. Therefore, the Commission's regulatory touch must be light, and it should respect the common law right of parties to bargain for terms and conditions in a free and competitive market.

II. The “Good Faith” Requirement Is About The Process, Not The Substance, Of Retransmission Consent Negotiations

Just because Congress purposely left its new “good faith” negotiation requirement abstract does not make it meaningless. By recognizing that the requirement pertains only to the *process*, and not to the *substance*, of retransmission consent negotiations, the Commission will respect the desire of Congress not to unduly intrude in the marketplace—and it will spare the Commission from unnecessary involvement in these negotiations.

A. The “Good Faith” Negotiation Requirement Simply Requires That The Parties Meet At Reasonable Times And Places And Confer On The Terms Of An Agreement

Once it is seen that the “good faith” negotiation requirement pertains only to the negotiation *process*, then the concept of “good faith” need not be defined by regulation but, instead, can be delineated through recognition that the purpose of the requirement is to bring parties to the bargaining table. In the context of retransmission consent agreements, a “fail[ure] to negotiate in good faith”³³ is simply a failure to meet at reasonable times and places and confer

³³ *Id.*

on the terms of an agreement.³⁴ That, at bottom, is all the “good faith” requirement is about. By conjoining the requirements that broadcasters be prohibited from “engaging in exclusive contracts for carriage or failing to negotiate in good faith,” Congress signaled its desire only that broadcasters, *having once made the decision to provide retransmission consent*, should be required to negotiate with all interested MVPDs and not engage in an outright refusal to deal. Requiring that broadcasters “meet at reasonable times and places and confer” with all interested MVPDs is a simple, easy to administer, bright line rule that fully comports with the requirements of the statute, as well as with the intent of Congress to leave the substance of the negotiation to competitive marketplace considerations.

With this bright line rule, there is no reason—let alone warrant—for the Commission to fashion expansive, prospective substantive requirements or to create—before any evidence or record of abuse is established—a menu of anticipated *per se* violations. As explained above, it is in each local television station’s self-interest to reach as many retransmission consent agreements with as many different MVPDs as possible. The Commission should stand back and allow the marketplace to work freely. If abuses of process develop, the Commission can recommend to Congress that it be given statutory authority to establish a comprehensive regulatory scheme to govern not only the *process* but also the *substance* of retransmission consent negotiations.

³⁴ *Cf.* 29 U.S.C. § 158(d) (providing that the obligation to bargain collectively entails the mutual obligation “to meet at reasonable times and confer” with respect to certain terms and conditions of employment).

**B. “Good Faith” Negotiation Necessarily Requires
A Mutual Obligation**

The *Notice* seeks comment on whether the duty of good faith negotiation also applies to the MVPD.³⁵ The statutory language clearly suggests that the duty is not bilateral and that it rests solely on the broadcaster. But it would be silly to require a broadcast station to negotiate in good faith with an empty chair.³⁶ Moreover, it would be impossible to judge the good faith of the broadcaster if the Commission were to look only at the actions of one party. To achieve the statute’s underlying policy objectives, the Commission must consider and weigh the conduct of the MVPD (and is authorized to do so under its broad mandate to protect the public interest) in assessing whether a television station has failed to satisfy the “good faith” requirement.

That mutuality of the “good faith” obligation is the norm is reflected in the “good faith” requirements of both the Taft-Hartley Act and the 1996 Telecommunications Act on which the *Notice* so heavily relies. The Taft-Hartley Act specifies that there is a “mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith.”³⁷ Section 251 of the 1996 Act imposes upon the incumbent LEC “the duty to negotiate in good faith The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.”³⁸ In both contexts, there is a disparity in the

³⁵ See *Notice* at ¶ 15.

³⁶ See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).

³⁷ 29 U.S.C. § 158(d).

³⁸ 47 U.S.C. § 251(c)(1).

bargaining power of one of the parties (the employer, the ILEC); nevertheless, the party without the perceived bargaining power is also obligated to negotiate in good faith.

C. The Development Of Substantive Rules Would Be Pointless Since The Commission Cannot Dictate The Terms Of A Retransmission Consent Agreement

Not only is the Commission without authority to promulgate substantive rules governing the retransmission consent negotiation process, but even attempting to develop such substantive rules would be a needless waste of administrative resources. The Commission cannot write the retransmission consent agreement for the parties; it cannot make the bargain for the parties; and it cannot compel one party to assent to any particular term. This conclusion naturally follows from the language of the statute, the statute's legislative history, and the many Supreme Court decisions interpreting the limits of a "good faith" negotiation requirement in the labor law context. For example, in *NLRB v. American National Insurance Company*, the Supreme Court stated that the NLRB "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the *substantive* terms of collective bargaining agreements."³⁹ In *NLRB v. Wooster Division of Borg-Warner Corporation*, the Court held that the duty to negotiate in good faith is limited to the statutorily-mandated subjects of "wages, hours, and other terms and conditions of employment," but it does not legally obligate either party to yield to a specific demand or proposal.⁴⁰ As to all other subjects, "each party is free to bargain or not to bargain,

³⁹ 343 U.S. 395, 404 (1952) (emphasis added).

⁴⁰ 356 U.S. 342, 349 (1958) (quoting 29 U.S.C. § 158(d)).

and to agree or not to agree.”⁴¹ And in *H.K. Porter Company v. NLRB*, the Court recognized that one of the “fundamental policies” of the Taft-Hartley Act is “freedom of contract.”⁴² Were the NLRB allowed “to compel agreement when the parties themselves are unable to agree[, it] would violate the fundamental premise on which the Act is based.”⁴³

Under the statute, the only relief that the Commission may grant for failure to negotiate in good faith is to compel the recalcitrant party to come to the bargaining table. That this is also the natural limitation of the Commission’s power follows from the fact that the NLRB, which possesses significantly more statutory authority in this respect, is, itself, limited to “requir[ing] employers and employees to negotiate.”⁴⁴

But this limitation should be of no concern. For all the reasons previously discussed, local broadcasters will not be reluctant to negotiate retransmission consent agreements with satellite carriers. While there may be differences between the parties as to terms and conditions, SHVIA expressly provides that such differences do not reflect an absence of “good faith.” Differences of this kind are the norm in a give-and-take negotiation.

It is self-evident that an expansive, intrusive regulatory scheme would impose excessive administrative burdens on the Commission’s limited resources and would inflict unnecessary legal and transactional costs on the parties. These burdens and costs will ultimately be borne by

⁴¹ *Id.*

⁴² 397 U.S. 99, 108 (1970).

⁴³ *Id.*

⁴⁴ *Id.* at 102.

the public. Thus, these costs should not be inflicted on the public by the Commission in the absence of a compelling and demonstrated public interest need. There are more than 1200 commercial television stations now operating in the United States.⁴⁵ All 1200 of them could potentially become engaged in retransmission consent negotiations with multiple cable systems, SMATV systems, MMDS services, and all four satellite carriers (DirecTV, EchoStar, PrimeTime 24, and Netlink) that operate in their market. The potential for MVPDs to *paralyze* the Commission's regulatory processes with the filing of thousands of complaints about retransmission consent negotiations is a legitimate matter of concern. Congress could not have intended such a result, and the Commission, by the action taken in this proceeding, should not encourage it.

D. To The Limited Extent The Commission Is Involved, "Competitive Marketplace Considerations" Can Only Be Determined On A Case-By-Case Basis

Section 325 provides "it shall not be a failure to negotiate in good faith" if the different terms and conditions a broadcaster offers to different MVPDs "are based on *competitive marketplace considerations*."⁴⁶ Just as in antitrust law, competitive marketplace considerations are highly fact-dependent. They can only be determined on a case-by-case basis.⁴⁷ A few examples of the kinds of considerations that come into play in a competitive market would be:

⁴⁵ See *Broadcast Station Totals As of September 30, 1999* (released Nov. 22, 1999) (stating that there are 561 commercial VHF stations and 682 commercial UHF stations).

⁴⁶ 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

⁴⁷ Similarly, the scope of the relevant marketplace is likely to be the market for the sale and distribution of video programming, but the actual scope is likely to be dependent on the facts (continued...)

- The size of the MVPD and the potential number of additional viewers it adds for the broadcast station
- The consideration paid to the station by the MVPD for retransmission consent rights
- The consideration paid by the MVPD to other stations and other program providers in the market and in other markets for similar rights
- The amount of money, if any, the MVPD charges its customers to receive the station
- The advertising revenues or other consideration received by the MVPD in packaging local station signals with other program services
- The character of the MVPD and its reputation for integrity and adherence to customary business practices and the rule of law
- Whether the MVPD is infringing or has infringed the local station's copyright or is misappropriating or has misappropriated the intellectual property rights held by the station in its program materials
- The willingness or ability of the MVPD to carry a station's digital signals, including multiplexed services
- The willingness or ability of the MVPD to carry the signals of other stations or other program services owned or controlled by the station or its corporate parent
- Whether a party will consent to an "on the record" negotiation process

However, it is simply not possible to craft a list of all the factors that go into a negotiation in a competitive market. Any attempt, therefore, to define the limits "specifically"⁴⁸ would be an exercise in futility. Conversely, it is equally clear that it would be impermissible for the

in the individual circumstance and cannot be determined *a priori*. Again, as in antitrust law, the relevant marketplace must be determined on a case-by-case basis. *See Notice* at ¶ 19 (seeking comment on the scope of the relevant marketplace).

⁴⁸ *Notice* at ¶ 19.

Commission to rule prospectively that any of the above considerations are not “competitive marketplace considerations” within the meaning of the statute. Thus, if a broadcaster justifies its offer to a MVPD of a particular term or condition based on what it believes to be an appropriate competitive consideration but which does not appear on the Commission’s initial menu of “competitive marketplace considerations,” the MVPD will surely file a complaint with the Commission and ensnarl the Commission and its regulatory structure in endless litigation—the very result the Commission indicated in the *Notice* it seeks to avoid.⁴⁹ Instead of adding regulatory certainty to the negotiation process, a prospective menu of “competitive marketplace considerations” will add uncertainty.

More important, the Commission does not have the statutory authority to promulgate rules whose effect would be to regulate *substantively* the terms or conditions of a retransmission consent negotiation or agreement. Yet, by attempting to define prospectively what may constitute “competitive marketplace considerations,” that is precisely what the Commission would be doing. It is difficult to imagine what could be more intrusive than to manipulate by regulatory fiat what may or may not constitute legitimate “competitive marketplace considerations.”

As noted earlier, should the market become dysfunctional—and there is no evidence of any kind to suggest it will—then the Commission will have ample opportunity to go back to Congress, make the case for, and seek the necessary statutory authority to adopt a prospective and comprehensive regulatory scheme.

⁴⁹ *See id.*

In this connection, the Commission's existing non-discrimination standards in both the program access and open video system contexts have no substantive relevance here.⁵⁰ Congress considered—but rejected—the adoption of a non-discrimination requirement for retransmission consent negotiations. Congress, obviously, knows how to enact non-discrimination rules as the explicit language in 47 U.S.C. § 548 concerning cable operators and satellite broadcast programming vendors confirms. There is no statutory warrant for the Commission to borrow a provision from another statute and apply it here when Congress has expressly considered and rejected it.

The *Notice* also seeks comment on the relationship between the Commission's recent relaxation of the television duopoly rule and a broadcaster's duty to negotiate in "good faith."⁵¹ There is no nexus. If a company owns or operates two stations in the same market, then whether an MVPD is or is not willing to negotiate a joint retransmission consent agreement is clearly a "competitive marketplace consideration." Any effort by the Commission to force a broadcaster to negotiate a separate retransmission consent agreement for each station with a MVPD is, perforce, at odds with the Commission's ownership rules and the statutory right to negotiate based on "competitive marketplace considerations."

⁵⁰ See *Notice* at ¶ 19 (seeking comment on the "relevance, if any" of the non-discrimination standards in 47 C.F.R. § 76.1002(b) and § 76.1503(a)).

⁵¹ See *id.*

**E. That Agreements Have Already Been Reached
Demonstrates That Government Intervention In
The Free Market Is Unnecessary**

The *Notice* seeks comment on the impact of any existing retransmission consent agreements between satellite carriers and broadcasters on the duty to negotiate in “good faith.”⁵² These agreements have been reached at arm’s length. The very fact that they were successfully concluded indicates that each party must have believed that the other was negotiating in good faith. The Commission has no authority to subject arm’s length transactions to a post-hoc “good faith” analysis. And most importantly, the fact that these agreements were reached *before* the Commission has acted to promulgate “good faith” rules persuasively demonstrates that any such rules are not necessary and that the market will assure that negotiations are concluded timely without intervention by the Commission. The existence of these agreements is the best evidence that intrusive Commission involvement is unnecessary.

**III. The Prohibition On Exclusive Contracts Simply Codifies The
Existing Regime Until The Entire Restriction Sunsets**

SHVIA’s amendment to Section 325 requires the Commission to promulgate a regulation that will

until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts⁵³

⁵² See *Notice* at ¶ 20. DIRECTV has reportedly entered into multi-year retransmission consent agreements with three of the four major networks for retransmission of their network-owned stations. See, e.g., *DIRECTV Reaches Agreement with NBC for Retransmission of Network-Owned Stations* (visited Jan. 7, 2000) <<http://www.directv.com/press/pressdel/0,1112,252,00.html>> (press release dated Dec. 6, 1999, stating that DIRECTV has signed retransmission consent agreements with ABC, Fox, and NBC).

⁵³ 47 U.S.C. § 325(b)(3)(C)(ii).

In enacting this provision, Congress acted with knowledge of the Commission's existing rule in Section 76.64(m)⁵⁴ prohibiting exclusive retransmission consent agreements since that rule was promulgated as a consequence of the congressional directive in Section 325(b)(3)(A). The new statutory language, therefore, merely codifies the existing regulatory regime until January 1, 2006.

As the *Notice* correctly observes, the new provision, on its face, sunsets on January 1, 2006, after which exclusive retransmission consent agreements between broadcasters and any MVPD are allowed.⁵⁵ Because the statutory language is plain on its face and because Congress acted with knowledge of the existing regulatory prohibition, it is clear that Congress intended to abrogate the Commission's existing rule prohibiting exclusive retransmission consent agreements with cable operators.

That there should be such a sunset is natural since the prohibition on exclusive contracts is in derogation of the common law right of freedom of contract. The Commission, itself, has previously noted that it "should and generally does support exclusivity rights."⁵⁶ In fact, even when the Commission first enacted its prohibition on exclusive retransmission consent

⁵⁴ 47 C.F.R. § 76.64(m).

⁵⁵ See *Notice* at ¶ 24.

⁵⁶ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, FCC 93-178, 72 Rad. Reg. 2d (P & F) 649 (1993), at ¶ 63.

agreements it stated that “exclusivity can be an efficient form of distribution.”⁵⁷ Despite its recognition of the potential efficiencies of such an arrangement, the Commission decided to prohibit exclusive retransmission consent agreements due to the same “concerns that led Congress to regulate program access and cable signal carriage agreements.”⁵⁸ In other words, the impetus behind the prohibition on exclusive contracts was a fear that they would be used to stifle the emergence of competition to cable.⁵⁹ This prohibition was designed to correct temporarily a perceived market imbalance and was never intended as a permanent requirement. The Commission stated that it would revisit its ban on exclusive contracts in three years, although it has never done so.⁶⁰ By establishing a sunset date in SHVIA, Congress, like the Commission, has recognized explicitly that the ban on exclusive retransmission consent agreements is merely a temporary solution.

By creating a sunset date for this regulation, Congress acted in the public interest. The ability to enter into exclusive contracts will spur the development of new programming. For example, if an MVPD has an exclusive retransmission consent agreement with a local broadcaster, other MVPDs in that market will have an incentive to create for themselves, or find

⁵⁷ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, FCC 93-144, 72 Rad. Reg. 2d (P & F) 204 (1993), at ¶ 179.

⁵⁸ *Id.*

⁵⁹ See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, FCC 93-178, 72 Rad. Reg. 2d (P & F) 649 (1993), at ¶¶ 61, 63.

⁶⁰ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, FCC 94-251, 76 Rad. Reg. 2d (P & F) 627 (1994), at ¶ 108.

someone to create for them, new and competitive programming to offer to viewers. Ultimately, this competition among MVPDs for programming will result in more programming choices, thereby benefiting consumers. As the Commission has previously stated, “[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.”⁶¹ Thus, “exclusive” agreements that take effect after the sunset of the statute should not be prohibited.

In order to demonstrate the existence of an exclusive contract in violation of Section 325(b)(3)(C)(ii),⁶² a complainant should be required to prove the existence of a contract, agreement, or undertaking between the television station and an MVPD that prevents the station from granting retransmission consent to any other MVPD serving the same area—in other words, the existence of an exclusivity provision. Circumstantial evidence cannot be sufficient to create a *prima facie* showing or to satisfy the burden of proving the existence of an exclusive retransmission consent agreement. For example, the fact that a broadcaster has entered into only one retransmission consent agreement in a market cannot be cited as evidence that the agreement is exclusive.

“Exclusive” is defined as “not shared or divided; sole ...”⁶³ Thus, by definition, if a broadcaster has a retransmission consent agreement with more than one MVPD in a market,

⁶¹ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, FCC 93-178, 72 Rad. Reg. 2d (P & F) 649 (1993), at ¶ 63.

⁶² *See Notice* at ¶ 24.

⁶³ Webster’s Dictionary 489 (2d ed. 1984).

neither agreement can be exclusive, and any complaint against the broadcaster alleging an illegal exclusive contract should be summarily dismissed.

Finally, the Commission should ensure that MVPDs are not able to use the complaint process as a vehicle for harassing broadcasters or other MVPDs with intrusive discovery requests designed primarily to ferret out confidential business information. A statement by the broadcast station that it has not entered into or that it is not engaging in an exclusive retransmission consent agreement with any MVPD should, in the absence of information to the contrary, be dispositive of the matter and result in summary dismissal by the Commission of the complaint.

Any exclusive satellite carrier retransmission consent agreements that predate the enactment of SHVIA should be grandfathered.⁶⁴

IV. The Burden Of Proof In Any Enforcement Proceeding Must Always Remain On The Complainant

The *Notice* requests comment on implementing enforcement procedures for violations of Section 325(b)(3)(C)(ii).⁶⁵ The Network Affiliates see no reason to depart from the special relief and complaint procedures set forth in Section 76.7 of the Commission's rules.⁶⁶ Such procedures are clearly adaptable for addressing any issues that may arise with respect to Section 325(b)(3)(C)(ii).

In this regard, expedited procedures are neither necessary nor statutorily authorized. In new Section 325(e), Congress expressly provided for expedited enforcement proceedings against

⁶⁴ See *Notice* at ¶ 20 (seeking comment).

⁶⁵ See *id.* at ¶¶ 26-28.

⁶⁶ 47 C.F.R. § 76.7.

satellite carriers for the unauthorized retransmissions of broadcast signals.⁶⁷ However, Congress obviously did not provide for such expedited procedures with regard to the “good faith” negotiation and exclusivity provisions of Section 325(b)(3)(C)(ii). Because it is presumed that Congress acts deliberately, the presence of provisions for expedited procedures with regard to unauthorized retransmissions and the absence of similar provisions with regard to “good faith” negotiation and exclusivity mean that Congress intended that the latter should not be subject to expedited procedures.⁶⁸

Section 76.7 of the Commission’s rules provides no burden shifting mechanism, nor is one warranted here. The burden of proof in any “good faith” or “exclusivity” complaint proceeding must always remain on the complainant.⁶⁹ As previously observed, the Commission must take into account that the restrictions in Section 325(b)(3)(C)(ii) are in derogation of the common law right of freedom of contract and therefore must be narrowly construed. Because a complainant will be seeking government intervention in the competitive, free marketplace, the burden of proof should always remain on the complaining party.

In addition, Section 76.7 requires that

⁶⁷ See 47 U.S.C. § 325(e).

⁶⁸ See, e.g., *Bates v. United States*, 522 U.S. 23, 118 S. Ct. 285, 290 (1997).

⁶⁹ Cf. *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981) (“It is settled that the burden of proving a violation of the National Labor Relations Act is on the General Counsel.”); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8th Cir. 1970) (recognizing, in a case alleging a failure to negotiate in good faith, that the “principle is firmly established that the burden is on the General Counsel to prove the essential elements of the charged unfair labor practices”).

[t]he petition or complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.⁷⁰

In the context of a “good faith” negotiation complaint, this requirement must be seen as requiring more than simple, bare allegations of “bad faith.” In fact, the complainant must come forward with specific allegations that go beyond mere complaints about “different terms and conditions, including price terms”⁷¹ since, by law, these cannot serve as a basis for finding a failure to negotiate in good faith. Indeed, a “good faith” negotiation complaint should be subject to summary dismissal if it does not contain a well-founded allegation that a party failed to meet at a reasonable time or place or confer on the terms of an agreement. In the context of an “exclusivity” complaint, this requirement should be seen as requiring specific allegations of the knowledge of a contract containing an exclusivity provision. A bare allegation that broadcaster “X” and MVPD “Y” have entered into an exclusive agreement is insufficient.

A difficulty the Commission will face in enforcing the amendments contained in Section 325(b)(3)(C)(ii) will not be in policing the industry but, instead, will be in handling the thousands of meritless and frivolous complaints that will be invited if the Commission attempts to impose a comprehensive regulatory scheme. The more expansive the regulatory structure, the more nooks the Commission will create in which pigeons will roost.

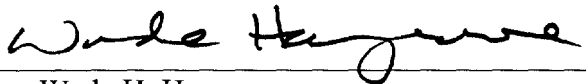
⁷⁰ 47 C.F.R. § 76.7(a)(4)(i).

⁷¹ 47 U.S.C. § 325(b)(3)(C)(ii).


Conclusion

The Satellite Home Viewer Improvement Act is designed to promote competition in the video programming delivery market. Inherent throughout the Act's structure is Congress's belief that the free play of the competitive marketplace, with due respect for intellectual property rights, will bring benefits to American consumers. The "good faith" negotiation and "exclusivity" prohibition provisions are in derogation of the common law right of the freedom to contract and both intrude on the free market. Therefore, both must be construed as narrowly as possible.

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